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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Anthony Maynard NELSON, Appellant.

No. C8-98-1920.
|
Nov. 2, 1999.

Affirmed, Davies, Judge. Ramsey County District Court, File No. K99827.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and Susan Gaertner, Ramsey County Attorney, Darrell C. Hill, Assistant County Attorney, St. Paul, MN, for respondent.

John M. Stuart, State Public Defender, Sharon E. Jacks, Assistant State Public Defender, Minneapolis, MN, for appellant.

Considered and decided by SHUMAKER, Presiding Judge, and DAVIES and WILLIS, Judges.

UNPUBLISHED OPINION

DAVIES.

***1** This appeal is from a judgment of conviction for first-degree assault. *See* Minn.Stat. § 609.221, subd. 1 (Supp.1997). We conclude that any error in excluding evidence of the victim's civil lawsuit against a third party was harmless and the trial court did not abuse its discretion by admitting character evidence and by failing to instruct the jury on defense of dwelling. We therefore affirm.

FACTS

Appellant Anthony Maynard Nelson was convicted of first-degree assault for stabbing Lorenzo Madrid at La Oportunidad, a halfway house in St. Paul. La Oportunidad is a duplex and, in July 1997, two residents, Madrid and Bennie Chapman, lived upstairs. Two other residents and appellant, who was the resident manager at the time, lived downstairs. La Oportunidad served as a program for persons on probation for various offenses. Participation in the program required observing a curfew and several additional rules, including no alcohol on the premises. As the resident manager, appellant was responsible for enforcing the house rules.

On the evening of July 18, 1997, Madrid and Chapman, the upstairs residents, got into a physical conflict after drinking at a neighboring house. The conflict was resolved, but appellant then demanded that Madrid return his key to La Oportunidad.

From this point on, accounts of the evening differ. Madrid claimed that: appellant grabbed him from behind and threw him through the door of the lower-level apartment of La Oportunidad, closed and locked the door, and proceeded to push Madrid, who responded by hitting appellant; as the two continued to fight, Madrid felt a pain in his lower abdomen; feeling lightheaded, Madrid unlocked the door, stumbled down the porch steps, and blacked out. The evidence is clear that he awoke in the recovery room of Regions Hospital with three stab wounds.

Appellant testified differently, claiming that: about a half hour after the initial conflict between Madrid and Chapman, he was on the porch with Chapman when several people from the residence where Chapman had been drinking approached the pair; appellant thought the group was after Chapman so he went inside La Oportunidad, grabbed a knife from the kitchen, and hid it in his pants; when he came back on the porch someone hit him; he began to return to the house and Madrid hit him; as appellant entered the house, Madrid forced his way in, locked the door, and started hitting appellant again; Madrid next got possession of appellant's knife, but appellant knocked it out of Madrid's hand; appellant retrieved the knife after it fell to the floor and told Madrid to leave; Madrid tried to grab the knife from appellant, but appellant stabbed Madrid; Madrid then unlocked the door and went outside; after Madrid left, appellant washed the blood from his hands and threw the knife out the back door.

The four eyewitnesses agree that, as appellant was standing on the front porch, he was hit by either Madrid or someone from the neighboring residence. But the eyewitnesses disagree as to other events surrounding the assault. Accounts as to how Madrid entered the lower level of La Oportunidad have him either falling in, entering while he was wrestling with appellant, walking in an open door, or walking in after appellant opened the door for him. Once Madrid was inside, the door was closed so none of these witnesses saw what transpired inside the residence. The next thing the witnesses saw was Madrid stumble out after he had been stabbed.

DECISION

***2** Evidentiary rulings are at the discretion of the trial court and will not be reversed absent a clear abuse of discretion. *State v. Willis*, 559 N.W.2d 693, 698 (Minn.1997). A defendant claiming that the trial court erred in admitting evidence has the burden of proving both error and resulting prejudice. *State v. Grayson*, 546 N.W.2d 731, 736 (Minn.1996). Reversal is warranted only when trial court error substantially influences the jury's decision. *Id.*

I.

Appellant claims the trial court abused its discretion and committed prejudicial error by denying him the opportunity to cross-examine Madrid about his pending civil lawsuit against La Oportunidad. In a criminal trial, defense counsel may generally "cross-examine a prosecuting witness to show the *pendency* of a civil action for damages by the witness against the *accused.*" *State v. Goar*, 311 Minn. 560, 561, 249 N.W.2d 894, 895 (1977). The theory behind this rule is that "such a suit indicates possible bias on the witness' part and is relevant to the witness' state of mind when testifying." *Id.*

In the instant case, defense counsel sought to elicit evidence of Madrid's suit for damages against La Oportunidad. The prosecutor's motion to limit such an inquiry was granted because the trial court found that the criminal prosecution was not relevant to the issues in the third-party civil suit. The trial court erred in this determination because a conviction of appellant would label appellant as a dangerous person and provide a better opportunity to prove that La Oportunidad was negligent in hiring and retaining Madrid. For this reason, the trial court committed error by not allowing appellant to cross-examine Madrid about his civil suit against La Oportunidad. This error was harmless, however, in light of the other evidence reflecting on Madrid's credibility and in light of all the other evidence of appellant's guilt. *State v. Starkey*, 516 N.W.2d 918, 927 (Minn.1994) (harmless error test is whether there is reasonable doubt that result would have been different if evidence had not been admitted).

II.

Appellant argues that the trial court abused its discretion by improperly admitting character evidence. Generally, the prosecution may not attempt to establish the bad character of a defendant unless the defendant has put character at issue by offering evidence of good character. *State v. McCorvey*, 262 Minn. 361, 364, 114 N.W.2d 703, 705 (1962). Such evidence "is inadmissible to prove the character of a defendant in order to show that the defendant acted in conformity with that character in committing the offense with which he or she is charged." [FN1] *State v. Buggs*, 581 N.W.2d 329, 336 (Minn.1998). *See also* Minn.R.Evid. 404(b).

***3** What appellant contends was improperly admitted as character evidence was evidence that appellant: (1) regularly consumed alcohol at the halfway house in violation of the rules; (2) used crack cocaine at the halfway house; (3) kept several knives at the halfway house; (4) threatened to use a knife to keep residents in line; (5) swung a stick at a resident; (6) was controlling; and (7) was paranoid. Character evidence may be admitted when the defendant "opens the door." *See* *State v. Gardner*, 328 N.W.2d 159, 161 (Minn.1983) (defense counsel opened door to evidence concerning defendant's character during cross-examination); *State v. Willis*, 559 N.W.2d 693, 699 (Minn.1997) (when defense counsel specifically asks whether criminal act is out of character for accused, defense counsel opens door to introduction of character evidence). When an issue is raised in defendant's opening statement the prosecution may properly respond. *State v. Blair*, 402 N.W.2d 154, 157 (Minn.App.1987) (finding admission of defendant's unemployment proper when issue was raised in defense's opening remarks).

In this case, defense counsel stated in opening remarks:

> You're going to hear testimony that's going to establish that this is not a house

> of angels. You're going to hear testimony that [appellant] has convictions, he has felony convictions. You're going to hear testimony that Mr. Madrid has felony convictions. You're going to hear testimony that other witnesses have felony convictions. You're going to hear testimony about what's referred to as control, house rules. This is a transitional housing situation. *House rule[s] focus on order, discipline, non-consumption of alcohol. You're going to hear testimony about how those house rules were walked upon and thrown out the door.* You're going to hear testimony about people involved in this melee consuming alcoholic beverages * * *. *You are going to hear testimony that [appellant] acted as the house leader. And he got into confrontation[s] with individuals about enforcing those rules, drawing a line, saying this is how you behave, this is how you conduct yourself.*

(Emphasis added.) Defense counsel also discussed the La Oportunidad rules and the confrontations appellant had with other residents regarding these rules.

Appellant, thus, brought up his own violations of the rules and his controlling personality in his opening statement. Appellant opened the door. It was not error for the court to admit prosecution evidence addressing character.

Appellant also submitted a pro se brief in this case. In his pro se brief, appellant challenges the trial court's evidentiary ruling regarding the exclusion of certain character evidence. All of these evidentiary rulings fall within the discretion of the trial court, which did not abuse its discretion. *See State v. Griller,* 583 N.W.2d 736, 742-43 (Minn.1998) (district court has great latitude in making evidentiary rulings and will not be reversed absent abuse of discretion).

III.

***4** Appellant also contends that, although he did not request jury instructions on defense of dwelling, the trial court committed plain error by failing to instruct the jury on this defense sua sponte. Decisions on jury instructions lie within the discretion of the trial court and no error results if no abuse of discretion is shown. *State v. Blasus,* 445 N.W.2d 535, 542 (Minn.1989).

By failing to object to the trial court's jury instructions, a defendant generally waives any challenge to the instructions. *See State v. Fox,* 340 N.W.2d 332, 334-35 (Minn.1983) (failing to properly object to omission of statutory element of offense in jury instruction forfeits challenge on appeal). But, even if there was no objection to the jury instructions, an appellate court can reverse if the instruction given is plain error affecting substantial rights. *Griller,* 583 N.W.2d at 740. An instruction is plain error and prejudicial "if there is a 'reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.' " *Id.* (quoting *State v. Glidden,* 455 N.W.2d 744, 747 (Minn.1990)).

Here, the instruction on self-defense was followed by an instruction on appellant's duty to retreat. Appellant contends the trial court erred when it included the duty-to-retreat instruction. His argument is based on *State v. Carothers,* 594 N.W.2d 897 (Minn.1999) (holding duty to retreat does not attach to defense-of-dwelling claim). But the record shows that the jury was instructed that it should acquit appellant if it believed that he reasonably and in good faith considered himself in danger from Madrid's actions. The duty to retreat was not a significant issue in this case. The prosecutor did not argue that under the facts appellant had a duty to retreat. Given the evidence, the duty-to-retreat instruction had no impact on the jury's decision. Therefore, giving the duty-to-retreat instruction was not prejudicial.

Affirmed.

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Gonzalo Gallegos-OLIVERA, Appellant.

A19-0023
|
Filed December 23, 2019

Hennepin County District Court, File No. 27-CR-18-12917

Attorneys and Law Firms

Keith Ellison, Attorney General, St. Paul, Minnesota; and Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Klaphake, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge*

***1** In this direct appeal from final judgment, appellant Gonzalo Gallegos-Olivera argues that his conviction of making threats of violence must be reversed because the district court abused its discretion by allowing a defense witness to be cross-examined about possible immigration consequences appellant might suffer as a result of this offense. We affirm.

DECISION

The scope of cross-examination is left largely to the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998). Appellant bears the burden of establishing that the district court abused its discretion and that he was prejudiced by the evidentiary ruling. *State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant "must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (quotation omitted).

Gallegos-Olivera was arrested after a road-rage incident and charged with making threats of violence in violation of Minn. Stat. § 609.713, subd. 3(a)(1) (2016), for pointing a BB gun out the passenger window at another car. Before trial, J.R., the driver of the vehicle, submitted a sworn affidavit that he (J.R.) was the one who pointed the BB gun at the driver of the other car. He also expressed concern to officers about Gallegos-Olivera's immigration status, should he be charged with a crime. Prior to voir dire, the judge reviewed a previous off-the-record conversation regarding the admissibility of Gallegos-Olivera's immigration status. He said that Gallegos-Olivera's immigration status may be relevant to show bias or motivation if J.R. testified that he was the one who pointed the BB gun at the victim's car. The judge notified the parties that if the subject of immigration arose during cross-examination, he would give a limiting instruction. Additionally, Gallegos-Olivera's attorney informed the judge and the state that he was currently in immigration removal proceedings.

At trial, J.R. testified in conformity with his statement that he was the one who pointed the BB gun at the other vehicle. And in cross-examination the state brought up Gallegos-Olivera's immigration status to show J.R.'s potential bias or motivation for testifying.

Gallegos-Olivera argues that the evidence of potential immigration implications was not relevant because it did not go to the elements of the charged offense. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Here, the evidence was admitted to show that J.R. had motivation to lie on the stand

and went to potential bias for his testimony. "[P]artiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974) (quotation omitted). The fact that J.R. was concerned about his friend's immigration status goes directly to determining why he may have testified the way he did. Therefore, Gallegos-Olivera's immigration status was relevant.

***2** Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. When balancing the probative value against the potential prejudice, unfair prejudice "is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

In deciding what effect the admitted evidence had on the verdict, this court considers "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002).

The evidence of Gallegos-Olivera's immigration status was brought up during a brief portion of the cross-examination of J.R., a defense witness. The purpose of the evidence was to show that J.R. had a motive to fabricate his testimony. The cross-examination was short and the defense did not redirect any questions on the matter. To reduce the prejudicial effect of the testimony, the court gave a limiting instruction before it allowed the state to cross-examine J.R. regarding his belief of Gallegos-Olivera's immigration status. Gallegos-Olivera had an opportunity to give input on the jury instruction prior to the state's cross-examination, and did not object on the record to the instruction. The limiting instruction directed the jury that it could only use the evidence to assess the credibility of J.R.'s testimony. This court presumes that the jury followed the district court's limiting instruction. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005).

Immigration came up a second time during cross-examination of the detective that received J.R.'s sworn statement. The state asked the detective what J.R. said to him regarding Gallegos-Olivera's immigration status. The defense attorney did not object to this line of questioning. Finally, neither party discussed immigration in their closing argument. Therefore, the probative value of Gallegos-Olivera's immigration status is not substantially outweighed by its prejudicial effect. And, even if the evidence was erroneously admitted, it is unlikely that it had a substantial effect on the jury.

Gallegos-Olivera argues that the probative value of the evidence regarding his immigration status is substantially outweighed by its prejudicial value because evidence of a defendant's immigration status is always unfairly prejudicial and should be excluded. This court has addressed the prejudicial effect of admitting testimony regarding immigration benefits for a crime victim. *See State v. Guzman-Diaz*, No. A17-1231, 2018 WL 352055 at *2-4 (Minn. App. July 23, 2019), *review denied* (Minn. Oct. 16, 2019). Additionally, this court has addressed the prejudicial effect of courts inappropriately considering a defendant's immigration status during sentencing. *See State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. April 16, 2002). However, these cases are distinguishable from the current case because they do not concern evidence that was admitted for the purpose of showing bias, prejudice, or motivation for a witness's testimony. Gallegos-Olivera also relies on a nonbinding Washington state supreme court case for the premise that immigration status is a "politically sensitive issue" that is highly prejudicial as to outweigh the probative value of the testimony. *Salas v. Hi-Tech Erectors*, 230 P.3d 583, 586-87 (Wash. 2010). None of the cited Minnesota cases support the idea that such a bright line rule exists. Nor has this court ever held that there is such a bright line rule, and we decline to adopt one here.

***3** Gallegos-Olivera also claims that the state could have used evidence of J.R.'s relationship with his sister to show potential bias, prejudice, or motivation. He argues that the state was required to use this evidence instead of his immigration status because this evidence was the least prejudicial evidence. This court has noted that there is no requirement in Minnesota that the state use the least prejudicial evidence. *State v. Rawson*, No. A18-0773, 2019 WL 2332493, *6 n.2 (discussing that Minnesota has neither adopted nor rejected the holding in *Old Chief v. United States* 519 U.S. 172, 182-85, 117 S. Ct. 644, 651-52 (1997) that the probative value of a piece of evidence is discounted if there is other, less-prejudicial evidence available to the state on the same point). Therefore, it was not necessary that the state only use J.R.'s relationship with Gallegos-Olivera's sister instead of his immigration status.

Because the evidence of Gallegos-Olivera's immigration status was relevant to show a witness's potential bias, the testimony did not substantially outweigh its prejudicial effect, and the court gave a limiting instruction, the court did not abuse its discretion in allowing this testimony.

Affirmed.

All Citations

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Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Nithara XAYSANA, Appellant.

No. C5-00-1102.
|
July 10, 2001.

Attorneys and Law Firms

Mike Hatch, Attorney General, and Susan Gaertner, Ramsey County Attorney, Jeanne L. Schleh, Assistant County Attorney, St. Paul, MN, for respondent.

John M. Stuart, State Public Defender, Jodie L. Carlson, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by WILLIS, Presiding J., HALBROOKS, and HANSON, JJ.

UNPUBLISHED OPINION

HALBROOKS.

***1** Appellant challenges his conviction of first-and second-degree criminal sexual conduct, arguing that the trial court erred by allowing the jury to take copies of a transcript of the victim's videotaped interview into the jury room and by responding to the jury's request to review the videotape without first notifying counsel. Appellant also argues that the prosecutor committed prejudicial misconduct by eliciting inadmissible testimony, injecting her personal opinion of the victim's veracity in closing argument, denigrating the defense theory, and shifting the burden of proof in closing argument. We hold that the trial court abused its discretion by permitting the transcript to go to the jury room and by communicating with the jury without consulting counsel. But because, on this record, the errors did not result in prejudicial error and there was no prejudicial prosecutorial misconduct, we affirm.

FACTS

In 1990, appellant Nithara Xaysana moved into his sister-in-law's home. While he lived there, he slept in the bedroom of his nieces, then eight-year-old complainant P.S. and her younger sister, sharing the same bed for a period of time.

When P.S. was approximately 12 years old, she told her cousin K.X. that appellant was sexually abusing her. P.S. spoke softly and cried when K.X. asked if she had been raped. K.X. told her parents about the abuse, and they told P.S.'s mother and stepfather. Appellant moved out at P.S.'s mother's request, when P.S. was about 12 years old. P.S.'s mother later denied that anyone told her about any sexual abuse.

In the fall of 1998, P.S. experienced depression and was referred to the school social worker, Vicky Uhr. Uhr suggested that P.S. join a support group at school for Asian girls. P.S. told Uhr that her mother was very strict, hit her, and took her paychecks. P.S. also told Uhr about the past sexual abuse by appellant. Uhr did not report the abuse because it had happened more than five years earlier and P.S. had not seen appellant and did not feel threatened at that time.

In the spring of 1999, P.S. saw appellant again. When P.S. told Uhr that she had been frightened by seeing him, Uhr responded that she was now legally required to report the matter. Uhr contacted the school's liaison officer, St. Paul police officer Steve Stoll. Stoll interviewed P.S. and later testified at trial that P.S. was visibly upset and that she stated that she was afraid to go home because appellant had approached her in her home and tried to hug her. P.S. told Stoll she was afraid that appellant would rape her again. Stoll made arrangements for P.S. to stay in a shelter. After a week at the shelter, she returned home.

On April 12, 1999, P.S. was interviewed and physically examined by Kimberly Martinez, pediatric nurse at the Midwest Children's Resource Center. In the videotaped interview that was later transcribed, a tearful P.S. described the abuse in detail.

Sex-crimes investigator Heidi Hinzman interviewed P.S., K.X., and appellant. When Hinzman asked appellant, through an interpreter, why he moved out of his sister-in-law's house, he said that it was because "he had sexually done something to [P.S.]." Later, he said he moved out because he had done something bad. He also said that P.S. was angry with him because he found, and then had taken away, notes from her friends.

***2** After the jury was empaneled, appellant objected to the admission of the videotape and transcript of P.S.'s interview with Martinez. Respondent argued that the videotape should be admitted either as statements made for the purpose of medical diagnosis or as a prior consistent statement. The court deferred ruling on the issue until after opening statements and ultimately admitted the videotape and transcript as a prior consistent statement because appellant's trial counsel commented adversely on P.S.'s credibility in his opening statement.

At trial, the jury heard testimony from K.X. about her conversation with P.S. P.S.'s sister testified that she remembered seeing appellant on top of P.S. once when they were all sleeping in the same bed.

P.S. described the abuse by appellant. She testified that appellant had also hit her when he had lived with them and enforced her mother's strict rules. P.S. also described her contentious relationship with her mother. Cross-examination revealed minor inconsistencies in her story.

Martinez testified about her interview with P.S. On direct, the prosecutor asked Martinez if she believed appellant, and, before defense counsel could object, Martinez answered affirmatively. In addition, Martinez testified that she had reviewed a transcript of the interview and found it to be substantially true and accurate. Before the jury was given the transcript, the court cautioned it that

> [t]here was no court reporter present at the time of this interview. And under court rules the party offering the tape prepares a transcript. And this is done based upon one person's hearing with a little help from others attempting to make sure they picked up every word. Again, there was no court reporter there to interrupt when a word was misunderstood. So this is the best transcript we have available.

The jury watched the videotaped interview in court, with a copy of the transcript in hand.

Respondent called Carolyn Levitt, M.D., medical director of the Midwest Children's Resource Center. Dr. Levitt testified that delayed reporting of sexual abuse was common. While Dr. Levitt testified that she believed that P.S.'s demeanor in her interview with Martinez indicated that there had been sexual abuse, she conceded that she could not rule out other causes for P.S.'s depression, sadness, and visible stress.

Appellant's theory of the case was that P.S. lied about the abuse because she wanted to get out of her mother's restrictive home. Appellant's expert, Robert Barron, Ph.D., testified that, although most reports of child abuse are truthful, his review of the videotape, police reports, and social worker's notes led him to conclude that there were indications in this case that the allegations were false. He based this conclusion on P.S.'s conflict with her mother and appellant, P.S.'s history of running away from home, and the inconsistencies in her allegations.

Appellant testified through an interpreter. He admitted that when he had lived with the family, he slept in the bedroom of P.S. and her sister. He denied any inappropriate touching of either girl. He testified that he had numerous conflicts with P.S. about house rules and had taken "love letters" from her backpack. He believed that he was asked to leave the apartment because his sister-in-law thought he was hitting the girls. He also stated that P.S.'s mother thought he was "forcing" the children. The interpreter explained that in Laotian, the word used for "forcing" may mean either forcing somebody to do something; a person with more power than someone else; beating someone up; killing somebody; or "forcing somebody sexually." Appellant acknowledged seeing P.S. before her birthday and said he did not go to the party because he could not afford the gift she wanted.

***3** During deliberations, the jury requested a VCR and television in order to review portions of P.S.'s videotaped interview with Martinez. Without consulting counsel, the trial court decided not to provide the videotape, but directed the jury to the transcript. Before the verdict was accepted, the court told counsel about the jury's request and its response. Appellant expressed surprise that the jury had been given the transcript, which he believed had not been entered into evidence and moved for a mistrial. Appellant's counsel's motion was denied. The jury found appellant guilty of criminal sexual conduct in the first and second degree.

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[illegible]

[illegible]

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[illegible]

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Minn.R.Crim.P. 26.03, subd. 19(1), provides:

> [illegible]

[illegible]

[illegible]